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"FATHER'S POWER TO MAKE A PARTITION OF ANCESTRAL PROPERTY."

In *Kandasami* v. *Dorasami*[1] the Madras High Court decided that in a Mitakshara joint family, the father has the power to alter the status of the family by effecting a partition amongst his sons, without their concurrence. The learned authors of the Digest of Hindu Law (West and Buhler pp. 301-302) are of a different opinion, but the Madras decision has generally been cited with approval in later cases (See, for instance, *Ganpat* v. *Gopalrow*,[2] *Visalakshi* v. *Sivaramien*[3] *Ruplaul* v. *Lakshmi Doss*.[4]) In the recent case of *Kunwar Brij Raj Singh* v. *Kunwar Sheodan Singh*[5] the Judicial Committee however observe that as the property was ancestral, Rao Balwant Singh "although head of the family, had no right to make a partition by will of that property among the various members of the family, except with their consent. They had independent rights in it with which he could not interfere." It must be admitted that their Lordships' judgment does not show anything like an examination of the general question of the father's power to effect a partition in the family during his life time. The original texts on the subject are not discussed and *Kandasami* v. *Dorasami*[1] is not even referred to. But the above observations cannot properly be regarded as an *obiter dictum* either. The point decided in *Kandasami* v. *Dorasami*[1] seems to us open to further argument and the decision itself is, it is submitted, not above doubt. The point may in the near future call for examination and decision preferably by a Full Bench, and in this view, it seems desirable to collect some of the materials relevant to the subject and make a few observations on the interpretation put upon some of them by the learned Judges who decided the early Madras case.

1. (1880) I. L. R. 2 M. 317.
2. (1899) I. L. R. 23 B. 686.
3. (1904) I. L. R. 27 M. 577. S. C. 14 M. L. J. 310.
4. (1905) I. L. R. 29 M 1.
5. (1913) 25 M. L. J. 188. (P. C.)

The text of Yajnavalkya is in these terms:—

विभागं चेत्पिता कुर्यात् इच्छया विभजेत्सुतान् ।
ज्येष्ठं वा श्रेष्ठभागेन सर्वे वा स्युः समांशिनः ॥

"When the father makes a partition, let him separate his sons from himself *at his pleasure*, and either dismiss the eldest with the best share, or if he choose, all may be equal sharers." Vijnaneswara explains this passage by saying that when the father wishes to make a partition, he may, at his pleasure, separate his children from himself whether one, two or more sons, in other words, the father's will in this respect is unrestrained, subject however to the restriction that he may dismiss the eldest with the best share, the middlemost with the middle share, and the youngest with the worst share. This is one mode of distribution and clearly indicates inequality. But again there is another method namely, if the father choose, all may be equal sharers. The unequal distribution at the father's pleasure is explained by Vijnaneswara as referring to the *self-acquired* property of the father (chap. I S. 2, pl. 2 to 5). With regard to property descended to him from his father, he says that an unequal partition at his pleasure is not proper, *for equal ownership, will be declared* (later on).

Vijnaneswara stops here at this point and says nothing further with respect to ancestral property. However, when Yajnavalkya in a later passage (chap. II, Sloka 121) mentions about the equal ownership of father and son in property descended from the grandfather, Vijnaneswara introduces it by saying "भवतु वा स्वार्जितवत् पितुरिच्छयैव इत्याशंकितः आह", in other words, that Yajnavalkya, apprehensive lest the sole pleasure of the father might be held to govern here also *as in the case of self-acquired property*, wished to be explicit, and declared that the ownership of both father and son is equal in respect of ancestral property. In a subsequent passage, (See Ch. I. sec. V para 7) Vijnaneswara says "'विभागं चेत्पिता कुर्यात्' इत्येतत् स्वार्जितविषयम्" that the sole pleasure of the father in the distribution has reference to self-acquired property. Again, later on Vijnaneswara says (Ch. I, Sec. V, para 11), "यत्पितामहार्जितम् etc....... विभजेदिति वदन् पितामहार्जितम् अकामोऽपि पुत्रेच्छया पुत्रैः सह विभजेदिति दर्शयति" The latter portion of this passage beginning from पितामहार्जितम्......and ending with दर्शयति, has not been translated by Colebrooke who has probably

overlooked it; if this portion is translated, it would run "what has been above said namely the equal ownership of father and son in ancestral property shows that the father even though unwilling, should divide the grandfather's property, *at the pleasure of* and *together with* the sons." The reason why पुत्रैः सह means "together with the sons" is clear, for that is the natural meaning which the word indicates. Among the various senses which the word सह indicates, the two most essential are यौगपद्यं and विद्यमानत्वं, implying simultaniety and actual presence respectively; so that according to Vijnaneswara the presence and concurrence or willingness of all the sons is quite necessary in the matter of distribution of ancestral property by the father. Further, if Vijnaneswara had meant otherwise, the words "पुत्रेच्छया पुत्रेषु विभजेत्" would naturally have been used. The following conclusions are therefore deducible:—

The two methods of distribution of property referred to in Yajnavalkya, ch. II, sloka 116 refer only to the self-acquired property of the father. In other words, a father may at his own pleasure, divide his own self-acquired property either equally or unequally among his sons. With reference to ancestral property, an unequal partition at the father's pleasure is not permissible because of the 'equal ownership' therein of father and son; but it would be wrong to infer from this that partition *at the sole pleasure of the father*, is permitted in the case of ancestral property also, provided it is not unequal. On the other hand it would be quite consistent with the theory of ancestral property that the son's pleasure also should be consulted in the division of ancestral property. This latter inference is fully warranted by Vijnaneswara's introductory remark on Yajnavalkya's theory of equal ownership in ancestral property (see supra: Yajnavalkya, ch. II, sloka 121), and the reference to पुत्रैस्सह in Mit. I. V. II. But, even assuming that "पुत्रैः सह" only means "(divide the property) *among* his sons", there is nowhere any specific hint or indication that even in the case of an equal distribution by the father, of ancestral property, the father's will or pleasure is the sole criterion.

The author of Colebrooke's Digest (Volume II, page 257) cites the text of Yajnavalkya on the self-acquired property of the father, and comments on it thus: "If his (the father's)

own pleasure be consulted in respect of property acquired by himself, is not the rule different in respect of property inherited from ancestors ? Yajnavalkya declares that *rule* :" The rule here referred to is as follows:—

भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥ (ch. II. sloka 121).

It is hereby clearly meant to suggest that the father's choice alone does not govern the distribution of ancestral property but that partition is made even by the choice of the son, for both father and son have the same or equal and independent proprietary rights in the property descended from the grandfather. (See Colebrooke Vol. II page 258). Moreover, in an earlier part of the Digest (Vol. II, p. 207), while commenting upon Vijnaneswara's interpretation of Yajnavalkya's text (ch. II, verse 116) it is observed. "In none of the three cases referred to by Yajnavalkya is the distribution made at the pleasure of the sons; and the reason of that is, their want of ownership. This however concerns the wealth acquired by the father himself; for a different rule will be propounded in respect of property descending from the grandfather. Such is the opinion intimated in the *Ratnakara*".

It may, however be argued that the word 'इच्छा' means only, pleasure or choice but does not imply consent or concurrence; and hence, the terms 'pleasure of father' and 'pleasure of the sons' simply indicate that in the case of the father's self-acquired property, the father has the sole discretion to partition the property, but that in the case of ancestral property, the son can at any time enforce its partition even though the father is unwilling; in short, that the term 'pleasure' cannot be understood in the extended and wider sense of "consent or concurrence." We shall examine the force of this argument step by step.

It is admitted that in the partition of self-acquired property of the father, the sons cannot complain of an unequal division because the father is the sole judge; it is his will and pleasure and the sons must abide by it even though such unequal division is detrimental to their rights of inheriting to such property if no partition had taken place during the father's lifetime. But even in such a case, there should exist a legal reason or a moral

reason and the father cannot of his own accord, or according to his whim, prefer one son to the other or others or exclude from partition any son or sons; so far is his 'pleasure' restricted. As observed by the author of the Smriti Chandrika (chapter II, Ss. 17-24) in his commentary upon the texts in respect of self-acquired property, an "unequal distribution made by the father, even of his own self-acquired property, according to his whims, without regard to the restrictions contained in the *shastras* is not maintainable, where sons are dissatisfied with such distribution."

In the other case *viz.* in the partition of ancestral property, the father's pleasure alone will not suffice but that of the sons also is required. This is because of the son's independent proprietary right to an undefined share of the whole ancestral property. In the one case, the consent is subjective, that is, it requires only one mind for its formation and hence it takes the restricted sense of 'pleasure or choice' whilst in the other, it is *objective,* in other words it requires in addition some outside agency for its formation and therefore the wider sense of 'consent or concurrence' ought to be applied. This outside agency is nothing but the consenting minds of the sons to the partition of the ancestral property. The above remarks obviously apply only where the father himself makes the partition. It is therefore submitted that 'pleasure' also implies 'consent or concurrence' in its wide sense, but that in the case of self-acquired property, it may have a restricted sense as pointed out above.

We may now turn our attention to the discussion of the texts in *Kandasami* v. *Dorasami.* [1] In the Judgment of the Court delivered by Justice Muthuswami Aiyar there are certain observations which, with the greatest respect to the learned Judge, seem to be based upon an erroneous inference from the various texts quoted and discussed therein.

The learned Judge begins by saying "According to the Hindu law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him though subject to certain restrictions imposed in the interests of the

1. (1880) I. L. R. 2 M. 317.

family." (See page 321). The question is, where is this power conferred and in respect of what property. Under the Mitakshara law, there is little difference between a coparcenary consisting of father and sons and one consisting of brothers only. (See *Palanivelappa Kaundan* v. *Mannaru Naikan* [1]). Of course, the sons are liable to pay their father's debts legally incurred, and the father is naturally (because of his position) the manager of the family. But as such manager he is in no better position than the manager of a coparcenary consisting of brothers only. He is in the position of a trustee and "holds a position in relation to the other members of the family and the family property peculiar to himself." He is in general the mere mouth piece of the family (See *Muhammad Askari* v. *Radha Ram Singh*[2], *Chuckun Lall Singh* v. *Poran Chunder Singh* [3], Apart from textual authority there is accordingly no question of 'paternal power' in such a case.

Again, the learned Judge continues "In cases like this, the question is not whether such partition is a contract like a partition made among brothers after their father's decease, but whether it is a legal transaction concluded in conformity to the Hindu law." This is to beg the question. The relation between father and son in a Mitakshara coparcenary is as much contractual as it is between the members of any coparcenary consisting of brothers &c. For instance when a son sues his father for partition of ancestral property, the father is bound to account for his management of the family property in the same way and to the same extent as the manager of a joint Hindu family other than a father; and the father is similarly fettered in his power of alienation of ancestral property except for justifiable purposes (though the theory of the son's liability for the father's debt legally incurred has made an inroad on these restrictions).

Muthusami Aiyar, J. dealing with the passage in the Mitakshara (ch. I s. 2, pl. 2), refers to Balambhatta's comment thereon and from these and pl. 6, infers that the father may *at his pleasure* separate his children from himself both with regard to self-acquired property and to property inherited by him; the

1. (1865) 2 M. H. C. R. 416 at 417. 2. (1900) I.L.R. 22 A. 307.
3. (1868) 9 W. R. 483.

distinction being that in the one case the distribution may be unequal, while in the other it should be equal subject in ancient times to be rendered unequal by means of a deduction in favour of senior sons as directed by the law. He then refers to pl. 14 of the same section where the legal effect of such a partition is stated. With due respect, it is submitted that the learned Judge has overlooked the fact that chapter I, s. ii of the Mitakshara refers only to the partition of the self-acquired property of the father during his life-time and that there is a separate section in the Mitakshara dealing with ancestral property and equal rights of the father and son therein. If the author of the Mitakshara had intended to include in the earlier section his observations on the partition of ancestral property as well, he would not have allotted a separate section for ancestral property with the heading " Equal rights of father and son in ancestral property." (See Mitakshara, ch. I, s. V).

Even assuming that the earlier section treats of both self-acquired and ancestral property, there is no hint any where in that section about the sole pleasure of the father in distributing ancestral property except the passage in pl. 6, that unequal partition in the case of property descended from the grandfather is not proper, for equal ownership will be declared. Having regard to the reason therein expressly given, that passage clearly does not support the inference that if the partition is equal, it can be made at the father's pleasure.

The Judgment further states, " This power *viz.* (to partition ancestral property without the consent of the sons) on the part of the father is recognised by all the commentaries in the south, and the Dayabhaga and the Dayakramasangraha. " We shall therefore next proceed to see what these commentaries have to say on the subject.

First in order, is the Smriti Chandrika (Chapter II, s. I Krishnasami Iyer's translation.)

It is submitted that the entire section refers only to partition of self-acquired property except where it has been expressly mentioned as referring to ancestral property. Reference is made to the two modes of partition laid down by Katyayana and

Baudhayana. Katyayana's text (See para 3 of the section) is in favour of equal partition by the father, whereas Baudhayana's text (See para 8) is in favour of unequal partition; allowing the father to give a greater share "one most excellent chattel" to the eldest son. The author of the Smriti Chandrika while commenting upon these two modes of partition, says in para 14 as follows:—"That which the father wishes to follow he may adopt; for, *in a partition made by the father, he alone is the lord and the selection of the one or other mode of partition rests entirely with him.*" (The italics are ours.) It is submitted that if this power of the father can be exercised it must be exercised only with reference to his self-acquired property, and not to property descended from the grandfather, for as is well-known the father is the lord in respect of his self-acquired property but not in reference to ancestral property. Yajnavalkya's text is quoted and commented upon by the author of the Smriti Chandrika in paras. 15 to 18 of the same section. The portion quoted is the one that as already pointed out, relates to partition of the father's self-acquired property. Narada's text on the subject is quoted and commented on in paras 19 and 20. Narada speaks of the father's arbitrary power to make any kind of partition equal or unequal, *for the father's will alone renders the partition legal.* "*He is the lord of all*" and so forth. (The Italics are ours.)

It will be too much to interpret this language as applying to ancestral property as defined by the Mitakshara. On the other hand, in Ch. VIII which treats of ancestral property, the Smriti Chandrika cites numerous texts, including Yajnavalkya, Katyayana Vishnu, Vyasa &c. declaring the independent rights of the father and son and their equality of ownership in ancestral property. In paras 20 and 21 especially, Yajnavalkya's text "The ownership of father and son is the same etc." is referred to and explained. Referring to the distinction between the father's property and the grandfather's property, as to the father's power, the author observes that in the case of the grandfather's property, *Svamiem* (ownership) and *Swatantriem* (independent power) are both equal in the father and son while in the case of the father's property, the father alone possesses *Swatantriem* and not the son.

Next comes the Madhaviya (Burnell's Translation p. 7.) After citing Yajnavalkya it proceeds. "The unequal division *at the will of the father* would be improper in the case of what is acquired by succession, as all the sons have an equal right in it." Then later on, it is said "Yajnavalkya has mentioned a peculiarity in the case of equal partition being made by the father:—'*If he makes the shares equal,* then the wives are to have equal shares if they had no *Stridhana* given them by their husband, or father-in-law.' If the father of his own accord makes the sons equal sharers, then the wives to whom *Stridhana* has not been given are to be made equal sharers with the sons: but if stridhana has been given them, he should give them a half; (*i.e.*) they are sharers in the half of the share of a son." (The italics are ours.) Evidently, Muthusami, Iyer J. concludes from this passage that wherever equal partition appears in the texts, it must relate solely to ancestral property, and unequal partition at the will of the father to self-acquried property. On the other hand, if we note in the passage cited above, the words 'if he makes the shares equal' and 'if the father *of his own accord* makes the sons equal sharers', the proper inference to be derived from them would be that there are two modes of partition of self-acquired property at the will of the father, namely equal and unequal partition, and that if the father *of his own accord* makes an equal division of his self-acquired property among his sons, then the rules with regard to the share to the wife must be strictly observed. Consequently the two modes of partition *at the will of the father* both relate to self-acquired property, but equal partition alone is possible and legal in the case of ancestral property. Further on, in the Madhaviya (Burnell's translation p. 12, para 16) we have the following observations in respect of ancestral property "Now the partition takes place because it is a well-known matter that the father and son have a right, but because the right is similar or equal, *the partition is not at the will of the father,* nor has he two shares; and so the rule 'the arrangement of shares is according to the fathers' is declaratory of equal right. And *on this account such rules as* "the father when dividing may take two shares for himself, *because they refer to unequal partition, were in force in a different yuga or refer to property self-acquired.*" (The italics are ours.)

We now pass on to the Vyavahara Mayukha, ch. IV, s.4, paras 6, 8, 12 and 14). The following passages from the Vyavahara Mayukha are especially important in this connection.

" Brihaspati however declares the father's right to only an equal share with his sons, even if there be only one, in property acquired by the grandfather. "In wealth acquired by the grandfather, whether it consists of movables or immovables, the equal participation of father and son is ordained." Yajnavalkya says 'for the ownership of the father and son is the same in land which was acquired by the grandfather or in a corrody or in chattels.' Katyayana says 'when the father *and the sons* divide the common wealth, in equal shares, it is called a legal partition."

Again in para. 14 "As for this text of Yajnavalkya 'A legal distribution, made by the father among sons separated with greater or less shares is pronounced valid :' according to Madana, Vijnaneswar and others, it means 'if the (distribution) made by the father be legal it cannot be set aside". This text again of Narada : 'For such as have been separated by the father with equal greater or less allotments of wealth, that is a lawful distribution *for the father is lord of all*' relates to former ages.' (The italics are ours).

The other texts cited in *Kandasami* v. *Dorasami* [1] namely Vyavahara Nirnaya, Dayabhaga and Dayakramasangraha are not of much weight and importance in this connection, as the two last especially are not authorities in the Mitakshara school of law.

Muthusami Aiyer J. later on refers to para 3 Chapter I, s. II of the Mitakshara, and para. 14 of the same section, and remarks that if it was necessary that in order that the partition might be valid it should always be the concurrent act of both father and sons, para 3 of Chapter I, s, II would be superfluous. It is submitted, however, that clearly enough, para 3 relates to one thing, and para. 14 to another; for the former speaks of the mode of partition by the father of self-acquired property, whereas the latter para. refers to the legal effect of such partition. Much stress also is laid by *Muthusami Aiyar J.* on the texts of Baudhayana and Narada 'for the father is the lord of all', and curiously

1. (1880) I. L. R. 2 Mad. 317.

enough, the learned Judge concludes from such texts that they must relate to ancestral property.

Again his Lordship's criticism of the statement in West and Buhler's Hindu law (page 301), doubting the father's power to partition ancestral property without the sons' consent cannot stand, as the texts referred to in West and Buhler's Hindu law are quite explicit on the subject under consideration.

Manu and Vishnu declare the partition of the grandfather's wealth to be in some cases dependent upon the father's wish alone, *e.g.* in grandfather's property seized by strangers but recovered by the father through his own ability, and over anything gained by him through science valour, *etc.* So that these texts plainly indicate that in other cases the partition of grandfather's property should be supplemented by the wish or consent of the sons also.

In the Sarasvati Vilasa (*Vide* Setlur's Collections of Hindu Law Books on Inheritance, pp. 144-145, s. 214-226), the position that the father and the son have equal ownership in the grandfather's property is discussed, and from ss. 21[illegible], 220 and 222 especially the inference that the son's wish or consent also is material, in the father's distribution of ancestral property may be very properly drawn.

Apararka in his commentary on Yajnavalkya Sloka 114 (See Srinivasa Iyer's Translation of Apararka in Vol. 21 of this Journal at p. 12) cites the text of Narada and says " Where division is made of the patrimony by the sons it is called by the learned partition of the property, a title in law. (Narada Ch. 13, s. 1, S. B. E. volume 33, p. 188). "Here the words 'patrimony' and ' by the sons' are both used indicatively. 'That the father should make a partition ' is with reference to the self-acquired property of the father. In the 'ancestral property' (*i.e.*, of the father's father, *etc.*) *the right to make a partition is equal to the father as well as to the sons.*"

Balambhatta's text has been cited in and commented on by West and Buhler in their Hindu Law at p. 301. They say "It is no doubt competent to a father to distribute to a certain extent his self-acquired property at his own pleasure amongst his sons. But it does not follow that by such a distribution a separation amongst

them individually and independently of their own desire will be effected." West and Buhler later on, at pp. 301-302 say that there is no distinction in fact between a co-parcenary consisting of father and sons and a co-parcenary composed of brothers, uncles and nephews, *etc.*, and that the father cannot of his own accord distribute the ancestral property among the sons and alter their status by separating them individually without their consent

M. V. RAMASAMI IYER, B.A., B.L.,
VAKIL, *Tinnevelly.*

SUMMARY OF ENGLISH CASES.

Ingram Royle Limited *v.* **Services Maritimes Du Trepout Limited,** 1914, III K. B. 28.

Costs—Plaintiff failing in appeal—Issue of Law and fact, plaintiff successful in first Court—Dismissal of plaintiff's action in appeal with defendant's costs—No reservation in appellate Court of plaintiff's costs on successful issue—Claim to have some taxed and set off against defendant's costs unsustainable—Supreme Court Rules Order LXV. rr. 1 and 8.

Where the plaintiff in an action entirely succeeded on issues of fact and law in the first Court and on appeal the judgment was reversed on the question of law and the appellate Court dismissed the action with costs of the defendants without making reservation in plaintiff's favour about the costs of the issue of fact with reference to which the plaintiff had succeeded, in the first Court held that the plaintiff's claim under order LXV, R. 2 to have their costs on the issue of fact separately taxed and set off against the defendant's costs of the action could not be sustained in the absence of any reservation by the appellate Court.

Wild *v.* **Tucker**, 1914 III K. B. 36.

Contract—Consideration—Agreement by undischarged bankrupt to pay debts in full—Consideration for promise—Fresh advance—Agreemen valid—Not opposed to public policy—Quantum of consideration immaterial.

An agreement by an undischarged bankrupt in favour of a creditor to pay all debts and liabilities incurred before the bankruptcy to the creditor in full, in consideration of a fresh advance

made by the creditor is supported by consideration and is legally valid and enforceable and is not opposed to public policy. If there is consideration, the adequacy of it ought not to be considered.

Ant Jurgens Margarine Fabreiken *v.* Louis Dreyfues and Co. 1914 III K. B. 40.

Sale of goods—Delivery order—Transfer to bona fide *transferee—Delivery order document of title—Title to goods passes—Refusal to deliver goods—Action for damages.*

A delivery order given by the defendant's company against their branch in a foreign country for delivery of defendant's goods with the agent was transferred by the holder of the delivery order in favour of the plaintiffs who took the same *bona fide* and for valuable consideration. The goods were refused to be delivered, the cheque received by the defendants for the goods for the original holder having been dishonored: *Held* in an action for damages for non-delivery of the goods that the defendants were not justified in refusing to deliver the goods, that the delivery order was a document of title given by the defendants to their buyer and that the plaintiffs *bona fide* transferees of the same were entitled to damages.

A document of title can be created by the owner of the goods and title will be transferred thereby. The document will operate though it is not given in respect of specific goods.

Lambert *v.* Home, 1914 III K. B. 86.

Proceedings in Public Court—Transcript of—If privileged—Discovery.

A transcript of short-hand notes of the proceedings in a former action, admitted to be relevant in the present action and disclosed in the affidavit of documents but objected to be produced as a privileged document, is not a privileged document being a transcript of what was public i juris.

Smith *v.* Selwyn, 1914 III K. B. 98.

Civil action for—Without prosecution, incompetent—If action brought, stay—Leave to amend.

According to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of the civil

action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution.

Where a civil action is brought without a prior prosecution, the proper course for the Court is to stay the action until criminal proceedings have been taken against the defendant with leave to the plaintiffs to amend the statement of claim and thus give them an opportunity of stating a cause of action without alleging a felony.

Egyption Hotels Limited *v.* **Mitchell**, 1914 III, K. B. 118.

Income tax—Company when said to carry on trade in England—Control or management test—Company in England but trade elsewhere—Taxability.

A Company in England exercising control from England over trade carried on in foreign places is carrying on a trade within the Limited Kingdom within the meaning of the Income-Tax Acts so as to render it liable to be charged with income-tax on the annual profits; but where the management and control of the business are left to persons elsewhere and there is no trade of any sort in England, the company is not chargeable except to the extent of the profits remitted from the foreign place to England. Spending of the profits, if any, of a business or any other way of dealing with the profits is not a carrying on of the business.

Ryall *v.* **Kidwell and Son**, 1914 III K. B. 135.

Landlord and tenant—Premises not in repair—Injury sustained by daughter of tenant—Liability of landlord—Duty of landlord to keep premises in repair—Common law—Obligation under S. 4 of the Housing and Town Planning etc., Act 1909 only contractual not statutory.

Prima facie at common law, a third person who suffers injury on account of want of repairs in certain premises let out to a tenant has no cause of action against the landlord in respect of such injuries. A landlord who lets out house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term.

The effect of S. 4 of the Housing and Town Planning etc., Act 1909, is not to impose a statutory obligation apart from contract on the landlord entitling all persons to proceed against the landlord for breach of it but only to import a condition, which

otherwise would not have existed, into the contract between the landlord and tenant that the former would keep the premises in repair of which condition the tenant alone being a party to the contract can take advantage.

The daughter of a tenant of premises out of repair has no cause of action for damages against the landlord for injury sustained by the condition of the premises.

Guiard v. Declormont and Donner, 1914 III K. B. 145.

Foreign Judgment—Enforcedbility—Voluntary submission to jurisdiction—Question on fact—Seizure of money in foreign country belonging to defendants—An appearance in consequence, if necessarily involuntary.

The defendants were sued on a foreign Judgment obtained in the French Courts for damages for breach of contract. The defendants abstained in the first instance from appearing before the French Tribunal of Commerce and allowed Judgment to go by default. Subsequently when the plaintiff had obtained a writ in the French Court corresponding to an order *garnishee nisi* against a French firm holding some money of the defendants in respect of such money, the defendants put in an opposition before the Tribunal asking the judgment by default to be set aside. The judgment was thereby set aside but on appeal, the court held that the defendants who had deliberately refused to accept process issued by the Tribunal of Commerce with knowledge of the nature of the process and the claim were not entitled to have the Judgment set aside, that their opposition was out of time and that on the merits also the plaintiffs were entitled to Judgment. The Original judgment was restored.

Held in the action in England on the foreign judgment (i) that a defendant who voluntarily appears in a foreign Court of a country to which he owes no allegience and in which he is not present but submits himself to its jurisdiction is bound by the judgment: (ii) That the mere fact that there was a very small sum of money in the foreign country seized for the satisfaction of the judgment did not make the appearance necessarily an appearance under compulsion or involuntarily: (iii) That the question whether the appearance was voluntary was one of fact: (iv) that though the defendants were not bound to accept the French process still after they had submitted to the jurisdiction,

the English Court could not say that the judgment of the Court of Appeal was wrong: (v) that the Judgment sought to be enforced after the decision of the Court of Appeal was regularly passed and was not passed by default and (vi) that the defendants were bound by the judgment—judgment of Fry J in *Rousillon* v. *Rousillon* 14 Ch. D. 351—Relied on for exposition of law in foreign judgments.

Kates *v.* **Jeffrey,** 1914 III K.B. 160.

Appeal—Case stated by Justice—Point of Law not raised before Justice—Raising of point in appeal—When permissible.

A question of Law arising on facts stated by justices but not taken before them can be taken before the Court of King's Bench and should be allowed only if the point is one which no evidence can alter and not otherwise.

Besterman *v.* **British Motor C. B. Company Limited,** 1914, III K. B. 181.

Practice—Costs—Co-defendants—Suit in the alternative—One asked to pay other's costs—Discretion of lower Court—Interference in appeal.

There is no rule of law that when two defendants are sued in the alternative and a decree is obtained against one of them the other being exonerated the defeated defendant could not be made liable for the costs, the plaintiff will have to pay to the successful defendant, unless the defeated defendant had given notice to the other that the whole blame will be thrown on him. Nor is there any duty on the part of either of the defendants to tell the plaintiff if asked, whether he means to throw the blame on the other. If the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of an action launched against one of the defendants who has succeeded in defending himself should be borne by the man who is to blame. The direction as to costs is a matter within the discretion of the Court and if the discretion has been exercised on materials before the court, the Court of Appeal will not interfere.

JOTTINGS AND CUTTINGS.

Banquet in Lincoln's Inn Hall.—Sir Edward Clarke, who is retiring from practice after fifty years of active life in the profession, was entertained by members of the Bench and the Bar in Lincoln's Inn Hall on July 17. The Lord Chancellor, who presided, had Sir Edward Clarke on his right, and the Attorney-General on his left. The company numbered about 230.

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The Lord Chancellor's speech.—The Lord Chancellor, in proposing the health of 'The Right Hon'ble Sir Edward Clarke, K.C.,' said he had risen to propose the toast of him to whom they had come to do honour as a distinguished figure in public life. (Cheers.) But he was notable for other qualities—qualities which had endeared him to those who were there present. (Cheers.) The Bar of England was an extraordinary feature of our constitution. It had grown up with our unwritten law; it had developed as political conditions had developed; and it had always endeavoured to fulfil a great function. There had been no period in the last three centuries in which it had not produced representatives strong enough and noble enough to stand for the liberty of the subject. It had striven to secure justice for every man, whatever his condition and however he might be oppressed. The tradition was a notable tradition. He doubted whether it was possible in countries with a constitution different from our own for the Bar to occupy that great position in the public eye which had been the characteristic of its history here. We lived in times when it was no longer necessary to defend the liberties of the subject from the interference of the Crown. Those days were over, and over probably for ever, but the Bar still required courage and assiduity and the spirit which animated men like Coke, Somers and Erskine, who in different times and places, and different emergencies, stood up fearlessly to protect those who were in distress. The Judges to-day were certainly neither timid nor subservient. They stood with great effect between the subject and the Executive. (Cheers). Long might it be so. (Cheers.) But if the Bar had not got the old problems to face, the Bar still required those qualities of character and, above all, of courage which had always been its distinctive characteristic. A man who needed a representative had at no time in the history of the

Bar sought one in vain. The tradition of which he had spoken had been embodied in recent years by no man more notably than by him who was their guest that night. (Loud cheers.) He had carried on the best traditions of the great profession to which he belonged. He had never flinched; he had never fought for his client less keenly than he would have fought for himself. Always scrupulous, always just, always desiring to do what was right, he had yet stood up for those who were his clients on memorable occasions and shown himself possessed of those qualities which they in that Hall venerated. (Cheers.) It was not only in the forum that Sir Edward Clarke had been distinguished for those qualities. It was his privilege to sit opposite to Sir Edward Clarke in the House of Commons for many years, and as he sat there he used to watch him, devoted to the traditions of the great party which he loved, embued with its principles, and yet never allowing himself to go beyond the limits which would convert him into the mere party man. When he thought he was right he was guided, not by tradition, but by his conscience. He was so little of a blind partisan that he imperilled his political prospects by standing up for what he believed to be right. That was a great and a rare quality, and when a man possessed it he might be sure that he would leave a deep impression on those associated with him. (Cheers.)

ADVOCACY AND CHARACTER.

As in the senate, so in the forum, always scrupulous as an advocate, never, as Lord Lindley said in his letter, twisting the truth or seeking to misrepresent his opponent's case, he was yet fearless and never flinched. He sometimes thought that beyond eloquence and learning at the Bar lay character, and their guest possessed character in addition to his great forensic gifts. (Hear, hear.) To his deep personal regret and to the regret of all of them, he was now parting from a profession which he loved and which loved him. After being fifty years at the Bar he had now elected to give himself that measure of repose and reflection which he thought they all did well, when the time came, to adopt. Life, after all, was a whole, and after the strenuous period of work there came another period in which reflection and meditation were necessary to sum it up, if they would live the life that was complete. Yet he could not bring

himself to believe that Sir Edward Clarke, full of strength as he still was, was wholly depriving the State of the opportunity of enjoying his services. It was not right to disclose what had passed in the secrecy of the Cabinet, but he would go very near to the line, and recall how, more than two years ago, when the great transport strike took place, when one of the great arterial industries of the country was threatened with serious injury, in the sense that if the life blood had been let out for a very long period the State's welfare might have been greatly imperilled, the question arose what was to be done, and a Cabinet meeting was called to deal with it. He remembered how one name rose to the lips of all of them, and they decided that there should be an inquiry held in public by a man who would command the confidence of employers, workmen, and public alike. The name that rose to their lips was that of Edward Clarke. (Cheers.) He held that inquiry, and did much by his influence and by his position to avert a great crisis. It might be that they might still count upon his great gifts and qualities, should such an emergency again arise. (Cheers.) He was leaving the Bar, but he was not leaving them who were his friends, and if he might in the name of those present convey, in a word, their feelings towards Sir Edward Clarke, it was that they felt a reverence for a notable public character and at the same time an affectionate regard for a man who was dear to them personally. (Loud cheers.)

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The Attorney-General's Eulogium.—The Attorney-General said he had the privilege on behalf of the English Bar of expressing in a few words their adherence to the toast which the Lord Chancellor had proposed. In this country the members of the Bar had not the custom, such as obtained in some other countries, of selecting from time to time by the votes of their own order as their professional representative the man who best embodied the traditions of their profession, and who had attracted to himself the admiration and the affection of them all. They had such a good custom in France, they had such a custom in Scotland, and he did not think he could better express the feeling of the English Bar towards Edward Clarke than by saying that, if they were an assembly of Paris advocates, he would long ago have been chosen as

thier *batonier*, and that if they were an assembly of Scots lawyers he would long ago have been elected as their perpetual Dean of Faculty. (Loud cheers.) It was not only that they felt proud of his half century of brilliant and varied achievement in the Courts; he was a barrister who had shown to other barrissers how, in public and in Parliamentary life, it was possible for one of them to overcome the painful prejudice against lawyers. (Laugther.) That such a prejudice existed was beyond dispute, though he held it to be a very unreasonable prejudice. It was based, he believed, partly on the view that in public life the lawyer was unduly technical, though, he declared, he knew nothing so technical as a layman talking law. And it was based in part upon the delusion that member of their profession in public life was less disinterested than other men, though the British constitution owed more to the disinterested devotion of lawyers than to the services of any other profession in the Kingdom. How complete and remarkable had been their guest's achievements in the public sphere they all knew. He would remind them of but two examples. They had nothing to do that night, happily, with the merits of any controversy, but if they had to select examples he thought there were two that would recur to the minds of many of them. The first was the occasion, in February, 1893, when Mr. Gladstone, then 84 years of age, presented his second Home Rule Bill in a three hours' speech, and when Mr. Balfour selected their guest in order that he might then and there move the rejection of that measure. That achievement was a piece of connected and eloquent reasoning which would long be remembered in Parliamentary annals. He did not know whether Sir Edward Clarke was going to refer to it, but he had always been brought up to the belief that, like the painstaking and ingenious advocate that he was, he had prepared two speeches—(laughter)—one to be delivered on the assumption that the second Home Rule Bill was a reproduction of the first, in which case he proposed to present the old objections with redoubled force—(laughter)—and the other to be delivered on the assumption that the second Home Rule Bill was different from the first Home Rule Bill, in which case he proposed to point out the difference, greatly to the disadvantage of the second. (Laughter.) That was the first occasion of which they would all think in this connection. He would venture to mention a second. It occurred some six years

afterwards when there was a very famous Parliamentary duel between two famous protagonists. One was their guest and the other was the great statesman whose loss they had been recently deploring. He would say nothing about the contest but this, that it was an encounter between two first-class fighting men, and that it was conducted to its conclusion without a foul blow being struck on either side.

INDEPENDENCE AND COURAGE.

What were the qualities which had enabled Sir Edward Clarke to surmount the prejudice which existed against their order in certain misguided quarters? Those qualities were two. He had the two supreme qualities which commanded public confidence and he had displayed them throughout the whole of his career. The first was independence, and the second was courage. (Cheers.) Those qualities had meant for him the respect of the British public, and they meant for him the admiration of his own profession. (Cheers.) He would always be remembered by Law Officers because he was the last holder of such office who protested against the Treasury Minute which refused to allow a Law Officer, in his abundant hours of leisure, to entertain private practice—(laughter)—and for the rest of them, his independence and his courage could hardly be better recorded then by reminding them that he had advocated the shortening of the Long Vacation. (Laughter.) What were the reasons why they were assembled at this great banquet and felt such admiration and affection for their guest in his professional life? He would endeavour in the name of those present to express their feelings. Sir Edward cultivated and developed and perfected a mode of advocacy which, while it served his client to the utmost, was always, as the Lord Chancellor had said, scrupulously fair to his opponent. (Cheers). He employed a style of cross-examination which was always forcible and was never brutal—(hear, hear); he exhibited a kind of forensic eloquence which showed that the orator was burning with the flame kindled within his own heart; and, lastly, he so conducted himself in the discharge of his professional duty that he set to every one of his brethren at the Bar an example of how a man might devote himself unsparingly to the cause he had to advocate and yet remain in some sense a minister of

justice. (Cheers.) He had endeavoured to say something of their guest as a public man and as a professional man. He hoped he would forgive him, and he hoped those present would forgive him, if he added one word about him as a friend. (Hear, hear.) It would always be a pride for him to remember that the first time he ever had a brief which was marked in double figures was in an arbitration where Sir Edward Clarke was the sole umpire. It would always be a pride to him to remember that the last case which their guest ever conducted at the bar was conducted when he prosecuted and Sir Edward Clarke defended in a great criminal cause— in the Central Criminal Court, where their guest first made his fame, and where he revisited the scene of his early triumphs, like

> The sun which casts its parting beams
> Upon the hills from which he rose.

And he had learned from the beginning to the end of his time at the Bar that to appear before Sir Edward Clarke, to be with him or against him, was to realise that side by side with the keenest adovcacy he always remembered that the members of the Bar were brothers. (Cheers.) His invariable kindness and encouragement to his juniors—(hear, hear)—his constant and unfailing fairness to the most obscure, had endeared him, he believed, to the members of the profession, even more than the great accomplishments which had earned him his place in the world at large. (Cheers.) The Bar joined with the greatest enthusiasm in the toast which they were about to drink, and he would beg Sir Edward Clarke to believe that that banquet was the inevitable expression of the esteem and the affection with which he would ever be regarded by the great profession of the law. (Loud cheers.)

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Sir Edward Clarke's Reply. Sir Edward Clarke, who received a great ovation on rising to respond, said: My Lord Chancellor, my dear friend the Attorney-General, my Lords and gentlemen, brethren all,—It is very difficult for me to make fitting reply to the speeches which have just been delivered, or to thank you for the great honour that you are doing me in this assembly of my brethren, who are offering to me an unexampled honour to-night. The most difficult task of all my professional

life has been reserved to its close. It is difficult indeed to make response—dangerous, perhaps, to try to make any. I am here to-night to take your verdict upon my career and character (laughter) —and there has been a curious inversion of the ordinary practice in our Courts. The Lord Chancellor has pronounced a judicial and reasoned judgment—(laughter)—after he has given that judgment the Attorney-General has made an eloquent speech for the defence, and when those are finished and all is over except the shouting—and there has been some of that—I am called upon to speak for myself. (Laughter.) It might be my part to be silent, though then I am sure I should be accused of being mute of malice. But to borrow another illustration, the Court is so clearly in my favour that to make any reply at all is rather dangerous, as I might suggest to the Judges that, after all, there was some reason to think that something might be said on the other side. (Laughter.) But I cannot, of course, try to answer the matter of the two very kind and generous speeches which have been delivered, or to refer to the merits which friendship to-night has magnified or to the defects which friendship is kind enough to forget. There is, indeed, only one matter referred to upon which I can fitly speak, and that is the unusual length of my career at the Bar. Fifty years have passed of active work at the Bar from the beginning to the end. There were 22 years of upward striving, there were six years of law office then 22 years of private practice, continuing to the end, not nominal practice, but substantial, and—I say it under my breath—lucrative practice, down to this very month. My life at the Bar began before the 'Law Reports' were born, but every year since the 'Law Reports' have contained some record of my work. In the first volume of the Privy Council Reports, in the 'Law Reports' my name appears as counsel in a case where I was junior to Hardinge Giffard in a very important criminal appeal, and I believe that the 'Law Reports' of the King's Bench Division for next month will contain a report of the latest argument of mine in *banc*. That pretty completely fills the 50 years, and it is at the end of that time a very proud moment for me to stand in the midst of this great gathering of the chiefs and leaders of my profession and to be assured by them, as you have assured me to-night, that throughout those 50 years I have

maintained the noble traditions of the English Bar. (Cheers). The name which I have just mentioned suggests the only personal reminiscence upon which I will venture to-night. My firm, resolve to make my way to the Bar dates from the night when more than 60 years ago, I heard Lord Lyndhurst, then over 90 years of age, make a speech in the House of Lords, and noted the respect, almost the reverence, with which he was treated in the House. My first case reported at the Bar before the 'Law Reports' existed, which is to be found in the LAW JOURNAL, was on April 27, 1865, when I was junior to MacMahon in an extradition case, and the leader on the other side was Hardinge Giffard. (Cheers.) My leader was just finishing his argument, and Giffard spoke to me and said, 'How long do you think you will be?' 'Oh,' said I, 'I don't think he has left anything for me to say; I do not see why I need follow.' 'Never mind,' said Giffard, 'You go on. You want the judges to know you, and you want to get used to hearing your own voice in court.' I followed that good advice, and I have been grateful for it during all the 50 years that have passed since. From that day to this Hardinge Giffard has been my kind friend, and it is one of my greatest pleasures in standing here to-night to receive this tribute of your kindness and your good will that there should be sitting next to me the Lyndhurst of our day—(cheers)—who has come to join in doing me honour.

FORENSIC ORATORY.

My Lord Chancellor, there is one draw-back to the profession of the Bar, and it is this, that abarrister's work, however well it may be done, is rarely known beyond his own generation. There are, no doubt, from time to time cases of great public importance, like, for instance, the Jameson case and the Parnell divorce case, which lead to very great and far-reaching political results. But although the names of those cases will be found in history, the names of the counsel engaged in them are unrecorded and are very soon forgotten. But there is one way in which the advocate may seek to secure some longer recognition of his work. Oratory has a literature of its own. The delightful but sadly neglected art of rhetoric finds its best illustration in forensic speeches. If the advocate addresses himself to his work, not only with the practical intention of securing

a verdict, but with the desire that his speeches should have some literary quality, there is a possibility that they may be remembered later. I have done my best. (Hear, hear.) The output of 50 years seems very small, but there are six speeches—three in criminal courts, three in civil courts—which I hope may be remembered for some little time at all events even after my generation has passed away. Let me say that I have been anxious to make some better acknowledgment of your kindness to me to-night than could be conveyed in an inadequate speech, so I have done myself the pleasure of writing my name and the date of to-day in sufficient copies of my volume of 'Selected Speeches' to provide one for every diner at this table. I shall be grateful to you if when you leave this Hall you will each kindly take one of those volumes and accept it as a souvenir of your kindness and of my gratitude. My Lord, you have spoken of the leisure, and Sir John Simon has spoken of the leisure, to which I may now look forward, and you have also kindly encouraged in me the hope, which I trust may be at some time gratified, that, although I am parting from the professional work of the Bar, I may be able to do some service to the public in some capacity for which my experience or knowledge may have fitted me. (Cheers.) But I do not think that leisure will be passed idly. In fact, the increasing leisure of the last few years has not been wholly wasted. I have written the story of my life for forty years. (Cheers.) I have prepared the best English version of the New Testament that has ever been published. (Laughter.) I have contrived the easiest system of shorthand that anyone could learn. (Laughter.) I have invented the simplest alphabet that the world has ever seen. (Laughter.) I am not speaking of these things to claim any great credit for them. There is hardly anyone in this Hall who could not have done any of them if the thought had occurred to him and if he had been willing to give the labour and time necessary for the work. But still, my Lord, I hope it may be an assurance that the leisure which I am hereafter to enjoy is not likely to be wholly wasted.

TWO DISAPPOINTMENTS.

Now, my Lord, you have spoken, and Sir John Simon has spoken, of my public and political life. I have had two great disappointments—one which tried me very

hard indeed; one which was of comparatively minor consequence. I did not go to the Bar from any attraction to the study of the law, but I came to the Bar because I believed that, through this profession and through it alone, I might be able to make my way to political influence and position. For a time all went well. Before I was 40 years of age, which, considering my commencement, was early, I had a seat in the House of Commons. Within six years I had become Solicitor-General, and then I had six years of the pleasantest association with my dear friend, Richard Webster—(cheers)—who wrote to me yesterday as well as to the Chairman, and from him I was glad to hear that he was so much better that he hoped next week to return to his home at Winterfold. Those six years passed, and I had three years of even greater enjoyment in active work on the Front Opposition Bench, the most delightful position in the House of Commons. But there came a time a little later when, upon a very grave question of public importance, I found myself in conflict with the leaders of my own party and with the popular feeling of the time. I could not make terms with my conscience. (Hear, hear.) I acted as I believed to be right, and my political ambitions and hopes suddenly passed into shadow. There was an afterglow where afterglows are not very often seen in the City of London. But an afterglow, however interesting and even brilliant it may be, is never the beginning of a new day, and so my political hopes vanished. Then there came to my mind the hope that I might be thought worthy of wearing the judicial ermine. That dignity indeed had been offered to me some years before, but it was at a time when my political ambition had not suffered eclipse, and I refused, and no opportunity of acceptance was given later.

A PRIVATE MEMBER OF THE BAR.

And so it comes to pass that at the end of these 50 years I finish as I began—a private member of the English Bar. To some that would look like failure, and indeed of late years I have been fond of quoting the beginning of that fine sonnet of Trench's:

> Not all who seem to fail have failed indeed.

But there has been no failure, and I have no reproaches or regrets. If success in life is to be measured in terms of personal happiness

as I think it ought to be, then no man has ever had a more successful life than mine. (Hear, hear.) God has blessed me with health of mind and body and has given me many kind and faithful friends. I have spent my life in the practice of the most interesting profession in the world. I have had golden opportunities of distinction both in politics and on the forensic side in law, and my political and professional activities have had for their background a domestic life of complete and continuous happiness, and I am grateful to the committee and to you that the authors and sharers of that happiness, chief of them my dear wife, have the opportunity of being here to-night. (Cheers.) And now, my Lord, I have only one other thing to say. It cannot but be that in the course of half a century of keen and constant and strenuous conflict I have from time to time been unfair and discourteous to my opponents—(cries of 'No')—and have failed to appreciate and acknowledge the help that has been given me by my juniors. There must in such a length of time have been such occasions. It has never been from malice or from jealousy. It has happened in the stress of very hard work and very great responsibility. I hope that when I leave this Hall to-night I may feel that all such faults have been fully and freely forgiven, and that there is not a cloud to dim the memory of the happy half century of work of which this is the closing scene. Once more, with all my heart, I thank you. (Loud cheers.) Lord Sumner proposed the toast of 'The Chairman,' and Lord Haldane responded *Law Journal.*

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Hardwicke Society. At the annual dinner of the Hardwicke Society the Lord Chief Justice in proposing the toast of 'The Guests,' coupled with the name of Sir Johnston Forbes-Robertson.

In their profession it was not wise to make too light of the gifts of voice and enunciation. In the profession to which their guest belonged neither of these qualities could safely be dispensed with, and in him they had *par excellence* a man whose voice had helped him to the high position he now occupied. He was one of those who in his profession—and it was well to remember it in theirs—never failed to give the closest attention to the study of elocution. No actor was so distinguished by a faultless style. He could not but think how admirable it would be if the mem-

bers of the Bar could go through a course of training such as he knew Sir Johnston Forbes-Robertson must have undergone before he acquired the excellence which characterised his mode of expression. (Cheers) *Ibid.*

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Mr. Justice Bankes, responding to the toast of 'The Bench,' proposed by Mr. W. W. Grantham, said the office of a Judge was a very high and honourable post which had great traditions behind it, and which entailed upon every occupant of it a great responsibility in endeavouring to maintain its high traditions. (Cheers.) Whether there was now upon the Bench any occupant whose name would go down to history as one of the great English Judges it was impossible to say. Living, as they did, in a time when they were bound by rules and statutes, there were not the same opportunities that occurred to some of the great men in times gone by when they were laying the foundations of our common law, of our commercial law, and of our admirable system of equity. Those times had gone by, and it might be that we should not see again such great Judges as those whose names now lived in history. But he was sure that there never was a time when the Bench was occupied by men with a sterner determination to do nothing to lower the traditions of their office or to decrease the general confidence in the Bench. (Cheers.) Their position in this country was rendered much more pleasant by the relations which existed between the Bench and the Bar. He had a very remarkable instance of that the other day. An American Judge who came into the Courts in which he happened to be presiding sent up his card and said he would be very glad to listen to a case. Of course, he asked him to sit on the Bench. It so happened that the case was being fought by probably two of the most strenuous advocates at the English Bar. At luncheon he asked him what he thought of our system. He said he was delighted with it, and when asked what of all that he heard and seen had struck him most, replied that it was the relation of the Bar to the Bench. 'In our country,' he said, 'it is one persistent and continual series of objections. That is our system, and if you went into our courts the impression that would be created in your mind would be that each advocate was trying to trip the other up, and that they were both trying to

trip the judge up. In your court you all seem to be endeavouring to get at the truth.' He said that was very pleasant to hear, and it was the more pleasant because they happened to be two of the most strenuous advocates that he could have shown him in the exercise of their profession. He said, 'Sir, if they were in our country we should consider them angels from Heaven.

No member of the Bench, however, could feel quite satisfied with the system under which at present the law was administered. At a City banquet at which he was present the other day the question arose how it was that practically all commercial disputes were decided by arbitration, and they asked him why he thought it was. It occurred to him to put it in the form of a question. He said, 'Can you wonder? If a man was going to bring an action he would naturally ask his solicitor three questions. He would ask, "If I begin an action to-day, when will it come on?" The answer would be, "Well, I can tell you within perhaps a month or so." The next question would be. "If I bring it, when will it end?" The answer would be, "Well I cannot possibly tell you, because it depends upon how often your opponent will appeal." The last question would be, "If I do bring an action, how much will it cost?" The answer would be. "The Lord only knows." He personally did not think that was right, and he hoped that under the guidance of the present Lord Chief Justice they might see an improvement (Cheers.) The first improvement must be that there should be more Judges available, for it was quite impossible to carry on any continuous system unless there was a sufficient staff. (Cheers.) *Ibid.*

Illegitimate Children. Can a man's illegitimate children become legitimate by his subsequent marriage to their mother? So far as the law of the United Kingdom is concerned the answer is a negative one, with one exception. If the man was domiciled, both at the dates when the children were born and when he married their mother, in a country (*e.g.*, Scotland) which allows legitimation by subsequent marriage is the only exception. But if the man was domiciled in England at either date they cannot; and the mere fact that the man and woman get married in Scotland after residing therefor 21 days cannot alter the status of the previously born children. *L. S. Journal.*

The Moratorium.: A Moratory law, as the authorities express it, is 'a law passed in times of emergency postponing for a specified time the due date of bills of exchange and other obligations.' The delay, or period of grace allowed by the law, is a 'moratorium,' and there are two degrees of moratoria—a minor and a major—the minor applying only to bills of exchange, and the major including these and all other contracts which enforce upon a debtor the liability to make money payments to a creditor at a fixed time. It is only a partial moratorium of the former kind which was established by the Bill passed through the House of Commons on Monday; for it applies only to bills of exchange and limits the term of postponement to one month. The effect of it is to relieve persons who cannot meet their bills from having them enforced during the period of grace on the terms that their ultimate liability shall be increased by the addition of the month's interest at the current rate. Once a moratorium is proclaimed it is usually continued by successive prolongations till the emergency has passed which gave occasion for it, and it may be assumed that, as in the case of France in 1870, the moratorium will be continued until the end of the war. More than that, it is to be expected that the minor moratorium will develop into the major, and that among the temporary expedients adopted by the Government to relieve the economic strain which is now placed on the country will be the postponement of the period of payment of loans and mortgages so as exclude proceedings to enforce such obligations during the war. There has been no moratorium in this country for over a hundred years, but one has to go back to Napoleonic times to find a parallel for the present emergency, and the magnitude of the crisis justifies the imposition of the full moratorium, which will give temporary relief against all monetary contracts. *Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

The English Law Journal (August 8) contains some interesting notes on questions of international law raised by the present war. The writer sees in the violation of the Belgian's neutrality the triumph of the principle of Kriegs-manier over Kriegs-raison. What is meant by it is that the violation of the best established neutral-rights can be justified when considerations of self-preservation require it. The triumph of this principle is a menace to the whole fabric of the law of nations. Another point considered is- the need for a declaration of war. The need for some formal notice has only been legally established since the Hague Conference of 1907. For instance the United States began war with England in 1812 by seizing all British vessels in their harbours, and in 1854, before the Ambassadors had withdrawn on either side, England entered the Baltic sea. An undoubted hostility as invasion of territory has the same effect as declaration of war and it is not clear whether such act did not precede the German declaration against France, Besides the right of capture of enemy's private property at sea, a belligerent state has from the moment of declaration of war, very sweeping rights over private property of its own subjects as well as neutrals; of appropriating anything useful for the purpose of war without any legal duty to make compensation, though as regards neutral owners payment of compensation may be compelled by the neutral Government. This right is known as *Angary*—which was the name given in Roman Law to the right of a Roman Governor to provide himself and his suite with means of locomotion from the provincials. It is in virtue of this right that the British Government seized four big men-of-war in English Dockyards which were being built for the Turkish and Chilian Governments. In virtue of this right Germany seized before the declaration of war some English ships in German waters. The conduct of the Germans might be justified also under the old practice of *Hostile embargo* by which the property of a country which is suspected of menacing war may be detained by the other country until its intention is manifested. As to the projected statute in America providing for transfer of vessels to the American flag, the writer is of opinion that it would be of little service as the more liberal opinion as reflected in the Declaration of London is that such transfer is void and need not be recognised by the belligerent states.

The Law Journal for August 22 contains some further notes of interest on the same topic. It refers to the recent legislation in England which has equalized the sailors' chances by declaring that all captured ships and their cargo are the property of the Crown which may of its bounty make grants to the naval forces thus removing the grievance of sailors engaged in war as against captors of merchant vessels the benefit of which used to go wholly to the captors. The writer thinks that the English Law as to trading with the enemy is somewhat out of date. The rule as stated in the text books is that executed contracts are suspended, executory contracts annulled and contracts made during the war entirely void. This may have to be taken subject to the modification introduced by the American Courts. If time is not the essence of the contract, and no service need be rendered or payment made during the period of hostilities, there is no reason in principle according to those decisions why the engagement should be dissolved. For instance it was held that a policy of life insurance with an enemy company did not lapse unless the insured person died during the war. The continental rule is much less stringent than this. There, the rule of the Hague convention which prohibits a belligerent from declaring the rights of an enemy subject to be annulled or suspended is interpreted as preserving intact all contractual and civil obligations between alien enemies even during the war. The English authorities have narrowed the application of the rule to the rights and obligations of an occupying force. But the continental practice is bound to affect the English attitude but to what extent, it remains to be seen.

In the Journal of the Society of Comparative Legislation for July, Mr. J. E. G. De-Mont Morency discusses the extent to which registration of marriage was required under the Medieval Roman Law. The way in which it tried to secure it was through the requirement of writing for marriage settlements, which usually, sometimes necessarily accompanied marriages. He thinks the problem that confronted Europe then by the recognition of unregistered or informal marriages confronts it still. In Italy to-day 6 per cent. of the marriages are marriages blessed by the church but not registered by the state. Though such marriage cannot be called concubinage, the issue are illegitimate.

In the *American Law Review* for July-August Mr. Edward J. White writes about "Legal traditions", how ultimately all law is mostly based on traditions and the part the lawyers have played in the shaping of those traditions and the pride they may naturally take in them and the jealousy they must show in guarding them from outrage. The advocate is fairly as old as the law being known to almost all the ancient legal systems. He was a highly respected citizen though even in those early days, his position provoked jealousy and his espousing the cause of one side and his fees were the subject misunderstanding and led to many ignorant gibes at him. For instance, the legal profession is ridiculed by Aristophanes in his Comedy "the Wasp" and by Juvenal. But their general good feeling was always noticed. See the feeling reflected in "Do as adversaries do in law, Strive mightily, but eat and drink as friends".

We lawyers though so keen,

Like shears, never cut ourselves, but what is between".

The Roman Law was the work of Roman Lawyers. Bartelus the great jurist of the 14th century contended for the Bar of France that after 10 years of practice in the profession, the *avocat* became *ipso facto* chevalier or knight. An idea of the high standard of professional ethics maintained by the lawyers of the day in France may be had from the following rules made for their guidance.

1. He was not to undertake just and unjust causes alike without distinction nor maintain such as he undertook with trickery fallacies and misquotations of authorities.

2. He was not, in his pleadings, to indulge in abuse of the opposite party or his counsel.

3. He was not to compromise the interest of his client by absence from Court when the cause in which he was retained, was called.

4. He was not to violate the respect due to the Court by either improper expressions or unbecoming gestures.

5. He was not to exhibit a sordid avidity of gain, by putting too high a price upon his services.

6. He was not to make any bargain with his client for a share in the fruits of the judgment he might recover.

7. He was not to lead a dissipated life or one contrary to the modesty and gravity of his calling.

8. He was not, under pain of being disbarred, to refuse his services to the indigent and oppressed. Their services to the progress and maintenance of law were incalculable. The superiority of the English law and the great regard for law which is the characteristic of the British Empire is also largely due to lawyers. Going over to America, the American constitution owes its origin to lawyers.

Mr. Agnes Mcnamara deprecates the conservatism of English Judges which makes them but rarely refer to the American decisions. From 1876 up to date the writer was able to find only 251 references to American cases, and 106 references to American Text books. Lord Esher makes the largest reference in 30 cases, Lord Lindley in 18, Lord Watson in 14, Kennedy J. in 12 Lord Halsbury and Lord Blackburn in 10 each. He points out some amusing inaccuracies contained in them owing to bad geography. Marshall C. J. goes for the largest praise in the English decisions. Story and Kent come in next though generally as authors. Holmes is also spoken of with respect.

BOOK REVIEWS.

LEGAL MAXIMS, *By Upendra Gopal Mitter, Vakil, High Court, Calcutta, edited by T. V. Sanjiva Rao: Published by the Law Printing House, Madras.*

This is a publication in a completed book form of what first appeared in monthly instalments. Mr. Broom's Classical work was of course not written with a view to the needs of the Indian student. In bringing out the present work the author and his generous publisher have therefore done a useful service particularly to students of Indian Law, in expounding well-known legal principles largely by the aid of Indian Statutes. The work is substantially modelled on Broom's book except that the alphabetical arrangement is substituted for the topical. The maxims selected and the discussion thereon cover almost every branch of law, but in spite of the vigorous remarks of the author at pp. 758 *etc.*, it is necessary to bear in mind that these convenient legal formulae are likely to prove dangerous half truths unless their proper scope and essential limitations in

practical application are sufficiently kept in view. The get up of the book would leave nothing to be desired but for a rather long list of errata in connection with the cases cited. We heartily commend the book to all earnest students of law.

MUNICIPAL CORPORATIONS IN BRITISH INDIA, *by P. Doraisami Aiyangar, High Court Vakil, Madras. Volume III. Messrs. Thompson and Co.*

This volume completes the author's work on the subject. In the earlier volumes was set out the Statute Law of India bearing on Municipal Government. The present book is, in the words of the author, devoted to a discussion of general principles, as gathered from the authoritative text books and the decisions of the Courts in India, England and America. Questions connected with Municipal administration do not in this country come up before Courts of Law so often as they do in America and in this sense, the book is not one necessary for the practising lawyer. But in so far as the legal profession has to take a large and growing share in the practical work of Municipal administration, a work, like the present, is a necessary part of every law library. The subject also concerns every intelligent citizen who aspires to take a proper share in the governance of his city and we have no doubt he will profit by the clear and simple exposition in this volume of the general features of the law relating to local self-government. As many a lay man who may have occasion to use the book cannot have access to a good law library, we would suggest to the author the desirability of incorporating in the book longer quotations from some of the leading authorities.

THE CRIMINAL LAW OF INDIA, *by John D. Mayne, 4th Edition, revised and enlarged, by Dr. Swaminathan, Bar-at-Law, 1914, Higginbothams, Ltd., Madras.* Rs. 21.

Uniform with the revised edition, lately published, of Mr. Mayne's Book on Hindu Law, the publishers are issuing a new edition of his work on the Criminal Law of India. A treatise, which, in one form or another, has enjoyed unabated reputation for nearly half a century, requires no words from us to introduce it to the profession. With the lapse of more than a decade since

the last edition, the need for a new edition cannot be gainsaid; and Mr. Mayne being no longer able to undertake the bringing out of a new edition, the publishers have done well in availing themselves of Dr. Swaminathan's services. In revising the work the Editor has been allowed a degree of liberty which Sir C. Sankaran Nair regretted he had not in revising the author's work on Hindu Law. We do not grudge the liberty thus given, but we should have preferred to see the original text and the editor's additions kept separate by some typographical devices, as is commonly done in the case of revised editions of standard works. Needless to say, the book has been thoroughly revised and brought up to date, as regards both statute law and case law. Among the special features of the present edition we notice a more copious reference to decided cases, including non-official reports and decisions of Indian Courts other than Chartered High Courts. The lengh of the index of cases will be some indication of the extent to which the citation of cases has been carried and opinions may vary as to the proper limit of a text-book, as distinguished from a digest of cases. The practising lawyer will however feel thankful for the change and the usefulness of the book is enhanced by the Appendices where some miscellaneous enactments connected with Indian Criminal Law, are printed with short notes and references to decided cases.